Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

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INTRODUCTION

The Platte River Whopping Crane Critical Habitat Maintenance Trust ("The Platte River Trust") timely moved for leave to intervene as a plaintiff in this original action. The States of Nebraska, Wyoming and Colorado (collectively the "States") filed briefs in opposition.[1] In their briefs, the States have needlessly confused two issues in their attempt to make this proceeding appear more complicated than it need be.[2]

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[1] The United States has not filed any memorandum in response to The Platte River Trust's Motion. In its Answer, however, the United States acknowledged that "[a]ny modification of the decree should accommodate the habitat requirements of migrating birds . . ." Answer of the United States at 3, ¶ 4.

[2] If nothing else, the issues raised in the States' opposition briefs demonstrate the substantiality of the issues raised in The Platte River Trust's Motion. Significant issues relating to *parens patriae*, the scope of the 1945 and 1953 Decrees, and the scope of the present proceeding are too important to be resolved summarily on the parties' preliminary papers. Such issues further point to the need for the appointment of a special master.

THE PARENS PATRIAE DOCTRINE IS IRRELEVANT

All three States turn the doctrine of *parens patriae* on its head by arguing that that doctrine should act to *prevent* intervention by The Platte River Trust. The doctrine is utterly irrelevant to The Platte River Trust's intervention since the doctrine only determines whether a *state* has standing to assert claims based on injury to its citizens. The standing of the States is not an issue in this case. As this Court explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-09 (1982), the doctrine enables a state to sue on behalf of its citizens. The doctrine allows a state to bring an action when neither its proprietary nor its sovereign interests are at stake. *Id.; see Louisiana v. Texas*, 176 U.S. 1, 19 (1900). Generally, a state invokes the doctrine to vindicate the economic interests of all, or a group, of its citizens. *Snapp*, 458 U.S. at 607. *See e.g., United States v. Nevada*, 412 U.S. 534, 539 (1973); *Louisiana v. Texas*, 176 U.S. at 19.

This Court has never held that *parens patriae* applies with regard to standing of individual citizens. The closest this Court has ever come to such a holding is the statement in *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953), in which it noted that, when a state sues *parens patriae*, there is a natural assumption that it represents all, not just some, of its citizens with regard to the particular interest at issue. *Id., citing, Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930). *See United States v. Nevada*, 412 U.S. at 539. This Court has repeatedly recognized, of course, that that presumption is rebuttable. *See, e.g., Arizona v. California*, 460 U.S. 605, 615 (1983); Memorandum in Support of Motion for Leave to Intervene at 3-4 (and cases cited therein).

None of the States has claimed in this case that it is suing *parens patriae* for its citizens, or that it is pursuing any rights other than its sovereign water rights and boundary interests. In none of its papers filed in this action has the State of Nebraska asserted that it is representing *parens patriae* the interest in protecting migratory bird habitat on the Platte River. Furthermore, not only has none of the States asserted The Platte River Trust's interests *parens patriae*, but The Platte River Trust has rebutted any presumption that the State of Nebraska could do so. *See* Memorandum in Support at 4-9, 11-15. Contrary to the misquotation in Nebraska's Opposition Brief, the State of Nebraska could probably not represent The Platte River Trust *parens patriae* because The Platte River Trust exists not just to serve the interests of the State of Nebraska but to serve the national and international interests defined in its Trust Declaration.[3] Under the proper formulation of *parens patriae*, it is arguable that none of the States has standing to represent The Platte River Trust because of its unique interstate interests. *See Snapp*, 458 U.S. at 607 (state cannot sue *parens patriae* if the state could not redress the alleged injury through exercise of its own sovereign legislative powers). To clarify the source of The Platte River Trust's interests, the relevant sections of its Trust Declaration are reprinted in Appendix A.

NEITHER NEBRASKA NOR THE PLATTE RIVER TRUST SEEKS TO REOPEN THE EARLIER DECREES

The States either misunderstand the relief which The Platte River Trust is seeking or else they are trying to distract this Court's attention from the limited scope of The Platte River Trust's proposed intervention. The Platte River Trust is *not* seeking to disturb the historical regime by which the State of Nebraska receives 75 per cent of the natural flow of the North Platte River; is *not* seeking an allocation of water; and most certainly is *not* seeking an appropriation from the State of Nebraska.[4] The Platte River Trust does not, in fact, seek to

[3] By filing one opposition brief, Wyoming tries to link The Platte River Trust and the National Audubon Society. The Court should not be sidetracked by Wyoming's attempt to ignore the unique source of The Platte River Trust's interest in the Platte River. The Platte River Trust and the Audubon Society are totally unrelated parties. Their interests are quite different, as are their grounds for intervention.

[4] The Platte River Trust agrees that this proceeding is not the appropriate forum for raising intrastate water rights issues. But The Plate River Trust may not be able to pursue such rights in Nebraska fora if this Court's apportionment makes the water unavailable. The Platte River Trust also agrees with the State of Colorado that this proceeding is not the appropriate forum in which to raise issues regarding South Platte River apportionment.

disturb the apportionment of waters among the States. Rather, The Platte River Trust requests that this Court affirm the State of Nebraska's claim to North Platte River water and ensure that the delivery of that water to Nebraska follows a natural flow pattern which makes it possible for the State of Nebraska to maintain existing water uses, including instream flow for migratory bird habitat. That relief is a far cry from the apportionment or appropriation specter raised by the States. That relief, moreover, could not be inconsistent with any of the States' interests in apportionment of water, unless the States were also seeking a particular annual pattern of river flows. None of the States has requested such relief.

Finally, the States are engaged in semantics by arguing that The Platte River Trust wants more modifications to the 1945 and 1953 Decrees than does the State of Nebraska. The Platte River Trust has asked this Court to hold that the "natural flow" of the North Platte River, as that phrase is used in *Nebraska v. Wyoming*, 325 U.S. 665, 666-70 (1945), requires maintenance of natural flow patterns of the North Platte River. The Platte River Trust has called that relief a "modification" of the Decrees. The State of Nebraska seeks the same type of relief through an "express articulation of the *tacit* elements of the decrees," Nebraska Memorandum in Opposition at 3 n.2 (emphasis added), but calls it a mere "clarification," *id.*, designed to prevent Wyoming from "increasing its depletion of the *natural flows* of the North Platte River." Nebraska Petition at 3-4 (emphasis added). Beyond counsel's choice of different words, there is no meaningful difference in the scope of the requested relief. The basis for both complaints lies in the substance of, and equitable apportionment made by, the 1945 and 1953 Decrees.

CONCLUSION

For the reasons discussed in this Memorandum, and for the reasons more particularly addressed in The Platte River Trust's Memorandum in Support of Motion for Leave to Intervene, this Court should grant intervention to The Platte River Trust.

Respectfully submitted this 10th day of April 1987,

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APPENDIX A

THE PLATTE RIVER WHOOPING CRANE HABITAT MAINTENANCE TRUST DECLARATION

[EXCERPT]

(Restated to include all amendments to said Trust Declaration duly adopted by the Trustees of the Trust and approved by the Court, as of November 20, 1981.)

I. *Establishment of Trust:* In order to ensure that the operation of the Grayrocks Dam and Reservoir does not jeopardize the continued existence of the endangered Whooping Crane (*Grus americana*) or result in the adverse modification of its designated Platte River critical habitat in Nebraska, Basin Electric Power Cooperative of Bismarck, North Dakota (hereinafter referred to as the "Settlor") as the Project Manager and Operating Agent of the Missouri Basin Power Project, a joint venture of Basin Electric Power Cooperative, Tri-State Generation and Transmission Association, City of Lincoln Electric System, Heartland Consumers Power District, Western Minnesota Municipal Power Agency and Wyoming Municipal Power Agency, has agreed, as an element of the settlement dated December 4, 1978, of the litigation styled *Nebraska, et al. v. Ray* and *Nebraska, et al. v. REA, et al.*, Case Nos. CV 78-L-90 and CV 76-L-242, respectively, in the United States District Court for the District of Nebraska (*Nebraska, et al. v. REA, et al.*, No. 78-1775, and *Nebraska, et al. v. Ray, et al.*, No. 78-1778, respectively, in the United States Court of Appeals for the Eighth Circuit), and by conveying to the Trustees hereinafter provided for, within ten (10) days after written notice from the Trustees, cash in the form of a check in the amount of seven and a half million dollars (receipt of which upon payment of said check is hereby acknowledged) to have and to hold IN TRUST, NEVERTHELESS, does hereby establish a trust to be known as "The Platte River Whooping Crane Critical Habitat Maintenance Trust" (hereinafter the

"Trust") for the purposes and on the terms and conditions hereinafter set forth.

II. *Purpose of the Trust:* The purpose of this Trust shall be to operate exclusively in connection with the carrying out of certain purposes of the State of Nebraska and the National Wildlife Federation, by financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska. This area contains habitat (hereinafter referred to as "critical crane habitat") which the Secretary of Interior pursuant to Section 7 of the Endangered Species Act of 1973 (P.L. 93-205), has determined to be critical to the continued survival of the endangered whooping crane, which determination was published at 43 Fed. Reg. 20938-20942 on May 15, 1978. This area also contains habitat essential to the continued well-being of the lesser sandhill crane (*Grus canadensis*) and for millions of migratory waterfowl. The programs, activities, and acquisitions referred to above shall be formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.

III. *Trustees:* The Trust established by this Declaration shall be administered by three trustees (hereinafter collectively referred to as the "Trustees"), one of whom shall be designated by the Missouri Basin Power Project, one of whom shall be designated by the Governor of the State of Nebraska, and one of whom shall be designated by the National Wildlife Federation. Each Trustee shall serve at the pleasure of the organization or person authorized to designate him or her and may, therefore, be removed and replaced by the designating organization or person at any time. Except as hereinafter otherwise expressly provided, the agreement of any two of the three Trustees shall be sufficient to take any action or make any decision authorized or required in the administration or execution of this Trust.

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